



1 disability due to obesity, a sleep disorder, and hypoglycemia. (Tr.  
2 63-69.) Benefits were denied initially and on reconsideration. (Tr.  
3 28-31, 33-34.) Plaintiff requested a hearing before an administrative  
4 law judge (ALJ), which was held before ALJ Richard Say on November 16,  
5 2006. (Tr. 311-343.) Plaintiff, who was present and represented by  
6 counsel, Antonio Gutierrez, and vocational expert Dennis Elliott,  
7 testified. The ALJ denied benefits and the Appeals Council denied  
8 review. (Tr. 6-9.) The instant matter is before this court pursuant  
9 to 42 U.S.C. § 405(g).

#### 10 **STATEMENT OF THE CASE**

11 The facts of the case are set forth in detail in the transcript  
12 of proceedings, and are briefly summarized here. At the time of the  
13 hearing, Plaintiff was 23 years old, had graduated from high school,  
14 and completed two years of community college through the Running Start  
15 program. (Tr. 112, 314.) She lived with Antonio Gutierrez. (Tr.  
16 315.) Plaintiff testified she last worked on July 9, 2004, as a  
17 technical support agent, but was terminated for attendance problems.  
18 (Tr. 315-316.) She attributes the attendance problems to a severe  
19 sleep disorder. (Tr. 316.) Plaintiff has past work experience as a  
20 customer service representative, sales clerk, and office helper. (Tr.  
21 331, 340.) She underwent gastric bypass surgery in September of 2005,  
22 and a second corrective surgery in March of 2006. (Tr. 150, 317.)  
23 Plaintiff testified doctors "have approved me for full exercise."  
24 (Tr. 323.) She stated she could lift 40 to 50 pounds, sit for 45  
25 minutes, and stand 30 minutes to 2 hours. (Tr. 323-325.)

#### 26 **ADMINISTRATIVE DECISION**

27 ALJ Say found Plaintiff met the insured status requirements for  
28 DIB through September 30, 2005. (Tr. 16.) At step one of the

1 sequential evaluation, the ALJ found Plaintiff had not engaged in  
2 substantial gainful activity since the onset date of July 9, 2004.  
3 (18.) At steps two and three, he found Plaintiff had the severe  
4 impairments of obesity, resolved with gastric bypass surgery, a  
5 juvenile/adolescent history of attention deficit-hyperactivity  
6 disorder (ADHD) and a depressive disorder, which resolved prior to  
7 Plaintiff's onset date of July 2004, but these impairments alone or in  
8 combination did not meet or equal one of the listed impairments in 20  
9 C.F.R., Appendix 1, Subpart P, Regulations No. 4 (Listings). (Tr.  
10 19.) The ALJ found Plaintiff's statements "not entirely credible."  
11 (Tr. 22.) At step four, he determined that prior to her gastric  
12 bypass surgery, Plaintiff had the residual functional capacity (RFC)  
13 to perform sedentary work, and within 12 months of surgery, the  
14 capacity to perform medium exertion work. (Tr. 19.)

15 At step four, based on vocational expert testimony, the ALJ  
16 determined Plaintiff could perform her past relevant work as a  
17 customer service representative. (Tr. 22.) Therefore, Plaintiff was  
18 not found "disabled" as defined in the Social Security Act at any time  
19 through the date of the ALJ decision. (Tr. 22-23.)

#### 20 STANDARD OF REVIEW

21 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
22 court set out the standard of review:

23 A district court's order upholding the Commissioner's  
24 denial of benefits is reviewed *de novo*. *Harman v. Apfel*, 211  
25 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
26 Commissioner may be reversed only if it is not supported by  
27 substantial evidence or if it is based on legal error.  
28 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
Substantial evidence is defined as being more than a mere  
scintilla, but less than a preponderance. *Id.* at 1098. Put  
another way, substantial evidence is such relevant evidence  
as a reasonable mind might accept as adequate to support a  
conclusion. *Richardson v. Perales*, 402 U.S. 389, 401  
(1971). If the evidence is susceptible to more than one

1 rational interpretation, the court may not substitute its  
 2 judgment for that of the Commissioner. *Tackett*, 180 F.3d at  
 3 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d  
 4 595, 599 (9th Cir. 1999).

5 The ALJ is responsible for determining credibility,  
 6 resolving conflicts in medical testimony, and resolving  
 7 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
 8 Cir. 1995). The ALJ's determinations of law are reviewed *de*  
 9 *novo*, although deference is owed to a reasonable  
 10 construction of the applicable statutes. *McNatt v. Apfel*,  
 11 201 F.3d 1084, 1087 (9th Cir. 2000).

### 12 SEQUENTIAL PROCESS

13 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
 14 requirements necessary to establish disability:

15 Under the Social Security Act, individuals who are  
 16 "under a disability" are eligible to receive benefits. 42  
 17 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
 18 medically determinable physical or mental impairment" which  
 19 prevents one from engaging "in any substantial gainful  
 20 activity" and is expected to result in death or last "for a  
 21 continuous period of not less than 12 months." 42 U.S.C. §  
 22 423(d)(1)(A). Such an impairment must result from  
 23 "anatomical, physiological, or psychological abnormalities  
 24 which are demonstrable by medically acceptable clinical and  
 25 laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3).  
 26 The Act also provides that a claimant will be eligible for  
 27 benefits only if his impairments "are of such severity that  
 28 he is not only unable to do his previous work but cannot,  
 considering his age, education and work experience, engage  
 in any other kind of substantial gainful work which exists  
 in the national economy. . . ." 42 U.S.C. § 423(d)(2)(A).  
 Thus, the definition of disability consists of both medical  
 and vocational components.

21 In evaluating whether a claimant suffers from a  
 22 disability, an ALJ must apply a five-step sequential inquiry  
 23 addressing both components of the definition, until a  
 24 question is answered affirmatively or negatively in such a  
 25 way that an ultimate determination can be made. 20 C.F.R. §§  
 26 404.1520(a)-(f), 416.920(a)-(f). "The claimant bears the  
 27 burden of proving that [s]he is disabled." *Meanel v. Apfel*,  
 28 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the  
 presentation of "complete and detailed objective medical  
 reports of h[is] condition from licensed medical  
 professionals." *Id.* (citing 20 C.F.R. §§ 404.1512(a)-(b),  
 404.1513(d)).

It is the role of the trier of fact, not this court, to resolve

1 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
2 supports more than one rational interpretation, the court may not  
3 substitute its judgment for that of the Commissioner. *Tackett*, 180  
4 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
5 If there is substantial evidence to support the administrative  
6 findings, or if there is conflicting evidence that will support a  
7 finding of either disability or non-disability, the finding of the  
8 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
9 1230 (9<sup>th</sup> Cir. 1987). Nevertheless, a decision supported by  
10 substantial evidence will still be set aside if the proper legal  
11 standards were not applied in weighing the evidence and making the  
12 decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d  
13 432, 433 (9<sup>th</sup> Cir. 1988).

#### 14 ISSUES

15 The question is whether the ALJ's decision is supported by  
16 substantial evidence and free of legal error. Specifically, Plaintiff  
17 argues the ALJ erred in his credibility and RFC findings.

#### 18 DISCUSSION

##### 19 A. Credibility

20 In *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9<sup>th</sup> Cir. 2002), the  
21 court held when an ALJ finds the claimant's testimony as to the  
22 severity of pain and impairments is unreliable, the ALJ must make a  
23 credibility determination with findings sufficiently specific to  
24 permit the court to conclude the ALJ did not arbitrarily discredit  
25 claimant's testimony. *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9<sup>th</sup>  
26 Cir. 1991) (en banc).

27 While the ALJ cannot disregard a claimant's subjective complaints  
28 regarding the severity of his or her symptoms solely because there is

1 a lack of objective medical evidence to support the testimony, there  
2 must be some objective medical evidence of an impairment for the time  
3 at issue. However, the lack of objective medical evidence is just one  
4 factor considered by the Commissioner. *Id.* at 345. The following  
5 factors may be considered: (1) the claimant's reputation for  
6 truthfulness; (2) inconsistencies in the claimant's testimony or  
7 between his testimony and his conduct; (3) claimant's daily living  
8 activities; (4) claimant's work record; and (5) testimony from  
9 physicians or third parties concerning the nature, severity, and  
10 effect of claimant's condition. *Thomas*, 278 F.3d at 958.

11 Once there is evidence of a medically determinable impairment  
12 likely to cause an alleged symptom, the ALJ must provide specific and  
13 cogent reasons for rejecting a claimant's subjective complaints.  
14 *Bunnell*, 947 F.2d at 346. In the absence of affirmative evidence of  
15 malingering, the ALJ's reasons must be "clear and convincing."  
16 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038-39 (9<sup>th</sup> Cir. 2007);  
17 *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9<sup>th</sup> Cir. 2001); *Morgan*, 169  
18 F.3d at 599. The ALJ "must specifically identify the testimony she or  
19 he finds not to be credible and must explain what evidence undermines  
20 the testimony." *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9<sup>th</sup> Cir.  
21 2001)(*citation omitted*).

22 Here, there is no evidence of malingering, thus the adjudicator's  
23 credibility determination must be supported by "clear and convincing"  
24 reasons. ALJ Say made the following credibility findings:

25 After considering the evidence of record, the  
26 undersigned finds that the claimant's medically determinable  
27 impairments could reasonably be expected to produce the  
28 alleged symptoms, but that the claimant's statements and the  
statements of her third-parties concerning the intensity,  
persistence and limiting effects of these symptoms are not  
found entirely credible.

1 (Tr. 22.) The ALJ appears to contradict this finding when he included  
2 the following limitation in the first hypothetical presented to the  
3 vocational expert:

4 [L]imited to sedentary activities, primarily because of her  
5 weight. . . . Assume further that this individual is  
6 afflicted with symptoms from various sources including mild  
7 to moderate chronic pain which is of sufficient severity to  
be noticeable to her at all times, but she would be able to  
remain attentive and responsive in a work setting, and could  
carry out normal work assignments satisfactorily.

8 (Tr. 340-341.)

9 In his decision, the ALJ states:

10 Based on the evidence of record, the undersigned  
11 accepts that the claimant has a past history of a mood  
12 disorder under Listing 12.04 for Affective Disorders, and an  
13 attention deficit-hyperactivity disorder (ADHD) under  
14 Listing 12.02 for Organic Brain Disorders, but these  
15 conditions were resolved prior to her alleged onset date of  
16 July 2004. The undersigned finds that since July 2004, the  
17 only "severe" impairment or condition that has affected the  
18 claimant was obesity which was also resolved with gastric-  
19 bypass surgery in September 2005. Her medical records  
thereafter show that, other than treatment for a gastric  
fistula, she was reporting doing well and eating all types  
of foods without difficulty, well within twelve months of  
her surgery. The undersigned further notes that she has  
reported spending a considerable amount of time on the  
computer; she is working on writing books; and she  
corresponded with a number of individuals in Japan over the  
internet.

20 (Tr. 21-22.)

21 The ALJ's finding that Plaintiff's credibility is diminished by  
22 her ability to write and communicate on the computer is not supported  
23 by the record. Plaintiff testified she currently spends 30 to 45  
24 minutes on the computer and stops due to lower back pain. (Tr. 321-  
25 323.) Plaintiff testified that from October 2005 (a month after the  
26 initial by-pass surgery) to by-pass corrective surgery and gallbladder  
27 removal in March of 2006, she could not sit at the computer for even  
28 5 or 10 minutes to check her email due to severe pain. (Tr. 327-329.)

1 While this is somewhat contradicted by the February 27, 2006, notation  
2 by Plaintiff's treating surgeon, Mathew Rawlins, M.D., that her first  
3 three and a half months after the first by-pass surgery were  
4 "uneventful" (Tr. 152), this is not mentioned by the ALJ. Six months  
5 prior to her first surgery, on March 17, 2005, Plaintiff told  
6 examining psychologist Ronald Page, Ph.D., she spends considerable  
7 time on the computer. (Tr. 113.) While the ALJ correctly observes  
8 that Plaintiff is currently finishing editing one novel and beginning  
9 another (Tr. 322), the record is silent (other than Plaintiff's  
10 testimony) as to the amount of time she spends daily at this activity.  
11 Similarly, the ALJ is correct that Plaintiff communicates with people  
12 in Japan over the internet, but the record does not reflect the amount  
13 of time spent at this activity.

14 Plaintiff's complaint of stomach problems on July 24, 2006, four  
15 months after the corrective surgery, to Dr. Rawlins (Tr. 257), is  
16 mentioned briefly by the ALJ: "In July 2006, she reported epigastric  
17 burning after meals, which persisted for about 30 minutes. However,  
18 she reported no other pain complaints including the abdomen, and she  
19 was tolerating a wide variety of foods. The symptoms were consistent  
20 with gastrojejunal ulcer." (Tr. 21.) After opining that Plaintiff's  
21 symptoms were consistent with a gastrojejunal ulcer, Dr. Rawlins  
22 ordered an upper endoscopy which revealed a marginal ulcer. (Tr. 257,  
23 260.) Plaintiff testified that after gastric by-pass surgery she has  
24 been required to eat many small meals throughout the day, meaning she  
25 was experiencing many episodes of 30-minute pain.

26 The remaining credibility findings, e.g., "medical records show  
27 that, other than treatment for a gastric fistula, she was reporting  
28 doing well and eating all types of foods without difficulty well

1 within 12 months of her surgery," does not accurately reflect the  
2 medical records with respect to Plaintiff's continued severe gastric  
3 problems before and after the corrective second surgery. On January  
4 6, 2006 (barely four months after the first by-pass surgery),  
5 Plaintiff reported to treating physician Bruce Barga, M.D., continued  
6 severe gastric problems, including multiple episodes of emesis daily,  
7 and difficulty swallowing either a liquid or soft diet. (Tr. 150,  
8 206.) Plaintiff underwent an upper endoscopy and upper GI on January  
9 10 and 11, 2006, which revealed the gastric fistula and stenosis of  
10 the gastrojejunostomy. (Tr. 214.) On January 27, 2006, Dr. Rawlins  
11 was able to dilate and avoid surgery, one of "multiple failed  
12 endoscopy dilations." (Tr. 150, 218.) On March 1, 2006, Dr. Rawlins  
13 preformed the second corrective surgery, a laparoscopic takedown of  
14 gastrogastic fistula and revision of gastrojejunostomy. (Tr. 150.)

15 Similarly, the ALJ's statement that Plaintiff's past history of  
16 a mood disorder had resolved prior to onset in July of 2004 is  
17 contradicted by treating psychologist Jimmye Angell, Ph.D.'s assessed  
18 GAF of 55 on August 17, 2005. (Tr. 228.) The ALJ's findings are  
19 neither specific nor "clear and convincing." (Tr. 20-22.) The ALJ's  
20 rejection of Plaintiff's mental impairments as "non-severe" at step  
21 two is unsupported by the record. The ALJ's failure to articulate  
22 "clear and convincing" reasons for rejecting Plaintiff's subjective  
23 complaints regarding the severity of her pain and limitations is  
24 reversible error. *Orn v. Astrue*, 495 F.3d 625, 640 (9<sup>th</sup> Cir. 2007).

## 25 **B. Remedy**

26 Although the record includes evidence that might be a basis for  
27 a rejection of Plaintiff's specific allegations regarding the severity  
28 of her symptoms and limitations, without the assertion of specific

1 reasons by the fact-finder, the court cannot assume Plaintiff's lack  
2 of credibility, and the court cannot make independent findings.  
3 Although counsel for the Commissioner enumerates reasons for upholding  
4 the ALJ's findings (Ct. Rec. 14 at 7-13), the reviewing court "is  
5 constrained to review the reasons the ALJ asserts." *Connett v.*  
6 *Barnhart*, 340 F.3d 871, 874 (9<sup>th</sup> Cir. 2003) (*citations omitted*). Where  
7 evidence has been identified that may be a basis for a credibility  
8 finding, but the findings are not articulated, remand is the proper  
9 disposition. *Gonzalez v. Sullivan*, 914 F.2d 1197, 1202 (9<sup>th</sup> Cir.  
10 1990). *Id.* On remand, the ALJ will conduct a new sequential  
11 evaluation, make new credibility findings with specificity, make a new  
12 RFC determination, and if necessary take additional vocation expert  
13 testimony at step five. The ALJ should consider the record in its  
14 entirety, including unrejected medical opinions and Plaintiff's  
15 unrejected testimony. Accordingly,

16 **IT IS ORDERED:**

17 1. Plaintiff's Motion for Summary Judgment (Ct. Rec. 11) is  
18 **GRANTED** and the case **REMANDED** for further administrative proceedings.

19 2. Defendant's Motion for Summary Judgment (Ct. Rec. 13) is  
20 **DENIED**.

21 3. An application for attorney fees may be filed by separate  
22 motion.

23 The District Court Executive is directed to file this Order and  
24 provide a copy to counsel for Plaintiff and Defendant. Judgment shall  
25 be entered for Plaintiff and the file shall be **CLOSED**.

26 DATED May 13, 2008.

27  
28 S/ CYNTHIA IMBROGNO  
UNITED STATES MAGISTRATE JUDGE